NO. 83-5573

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1983

CHARLES YOUNG, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

ON APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS

JURISDICTIONAL STATEMENT - STATE CRIMINAL CASE

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 18753500
2504 Ninth Street
Wichita Falls, Texas 76301
(817) 766-1700

QUESTIONS PRESENTED

Did the Court of Appeals err in holding Art. 38.13, Vernon's Texas Annotated Code of Criminal Procedure, which provides, "The trial judge is a competent witness for either the State or the accused, and may be sworn by the Clerk of his court and examined, but is not required to testify if he declares that there is no fact within his knowledge important in the case," constitutional and not in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States of America.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS AND AUTHORITIES	ii
CITATION TO OPINION BELOW	1
JURISDICTIONAL GROUNDS IN THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1, 2
STATEMENT OF THE CASE	2
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	2
CONCLUSION	9
CERTIFICATE OF SERVICE	10
APPENDIX	11

TABLE OF AUTHORITIES

All Texas Racing Association v. State, 82 S.W.2d 151 (Tex.Cr.App.-1935)	9
Baylor v. State, 208 S.W.2d 588 (Tex. Cr.App.-1948)	9
In Re Levinson, 274 S.W.2d 76 (Tex. Cr.App.-1955)	9
Kemp v. State, 382 S.W.2d 933 (Tex. Cr.App.-1964)	8
Terrell v. United States, 6F.(2d)498, 4th Circuit, Circuit Court of Appeals, 1955	7
Art. 1.12, V.A.C.C.P.	7
Art. 38.13, V.A.C.C.P.	1, 2, 5, 6, 7, 8, 9
53 Tex.Jur.2d Statutes §124, p. 179	9
Rule 605, Federal Rules of Evidence	7
Title 28, U.S. Code §1254(2)	1
United States Constitution, Fourteenth Amendment, Due Process Clause	1, 5, 7, 8

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1982

CHARLES YOUNG, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

JURISDICTIONAL STATEMENT - STATE CRIMINAL CASE

CITATION TO OPINION BELOW

The majority of the opinions of the Court of Appeals is reported at 629 S.W.2d 247 and is annexed as Appendix A. The order overruling the Petition for Discretionary Review is annexed as Appendix B, and Appellant's Notice of Appeal is annexed as Appendix C.

STATEMENT OF JURISDICTION

In affirming Appellant's conviction, the Texas Court of Appeals sustained the constitutionality of Art. 38.13, Vernon's Texas Annotated Code of Criminal Procedure, which provides as follows:

> "The trial judge is a competent witness for either the state or the accused, and may be sworn by the Clerk of his Court and examined, but he is not required to testify if he declares that there is no fact within his knowledge important in the case."

The jurisdiction of this Court is conferred by Title 28, U.S. Code §1254(2).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Due Process Clause.

STATUTORY PROVISIONS INVOLVED

Art. 38.13, Vernon's Texas Annotated Code of Criminal Procedure.

STATEMENT OF THE CASE

This is an appeal from the 78th Judicial District Court, Wichita County, Texas, Honorable Stanley C. Kirk presiding. Charles Young went to trial on the charge of aggravated robbery alleged to have been committed on the 9th day of June, 1978. Charles Young was convicted of this offense on September 20, 1978, and was sentenced on October 9, 1978 to seventy-five years in the Texas Department of Corrections and thereupon gave his notice of appeal to the Court of Criminal Appeals of the State of Texas. The case was subsequently transferred to the Court of Appeals, Second Supreme Judicial District. The Court of Appeals, Second Supreme Judicial District, by an opinion rendered on February 24, 1982, affirmed Appellant's conviction. The Petition for Discretionary Review was filed with the Texas Court of Criminal Appeals and was overruled on July 20, 1983.

During the punishment phase of the trial, the presiding judge left the judicial bench vacant and made himself a witness in the case against the Appellant.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents the important question of whether a trial judge can testify against a defendant in a criminal case in reliance on Art. 38.13, Vernon's Texas Annotated Code of Criminal Procedure, and this action still be consistent with the Constitution of the United States of America, Fourteenth Amendment, Due Process Clause.

Therefore, the issue presented to the Texas Court of Criminal Appeals and to the Court of Appeals and this Court is whether or not Art. 38.13 violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States of America.

During the trial on punishment, Shirley Schroeder (S.F., T/P, p. 5, l. 5), stated she was a deputy in the District Clerk's Office in Wichita County and among her duties is the maintenance of records in regard to criminal cases. (S.F., T/P, p. 5, l. 10-25; p. 6, l. 1-8). Whereupon the State had marked as exhibits an indictment in Cause No. 14,372-B, styled The State of Texas vs. Donnie Ray Higgins, Charles Young, and Robert H. Mack (State's Exhibit No. 29) and a judgment in Cause No. 14,372-B, styled the State of Texas vs. Charles Young, marked as State's Exhibit No. 29A. Also marked at the same time was State's Exhibit No. 29B, which appears to be a judgment of probation in Cause No. 14,372-B, styled The State of Texas vs. Charles Young. The deputy district clerk was asked at that time the question: "All right, who is the defendant named in that file?" Whereupon the Defendant made the objection: "Excuse me, your Honor. Before we go any further, I would like to make an objection, unless the State has prepared to prove at this time the identity of the individual named in these papers are the same." The Court: "Overrule the objection." (S.F., T/P, p. 6, l. 22-25; p. 7, l. 1-5).

After the objection of the Defendant had been overruled, the State's attorney went on to ask the deputy district clerk who the named defendants were in Cause No. 14,372-B. Whereupon the deputy district clerk read the names from the indictment as being Donnie Ray Higgins, Charles Young, and Robert H. Mack. (S.F., T/P, p. 7, l. 8-14). Then the deputy district clerk was asked to read the indictment in Exhibits 29, 29A, and 29B. Here again the Defendant made the objection, "Hold your answer for just a minute. Your Honor, here again I would object because the identity of the individual named in this instrument has not been established as being the same as this Defendant." The Court, "Overruled." (S.F., T/P, p. 9, l. 17-25; p. 10, l. 1). The

deputy district clerk was then asked further details about the nature of the offense and the fact that the Charles Young named in that instrument had been placed on four years probation. (S.F., T/P, p. 10, l. 1-12).

Then the deputy district clerk was asked questions concerning State's Exhibit No. 30, 30A, and 30B. State's Exhibit No. 30 was identified as an indictment in Cause No. 17,554-B, styled The State of Texas vs. Charles Young. State's Exhibit No. 30A is a judgment in the State of Texas vs. Charles Young, Cause No. 17,554-B, and State's Exhibit No. 30B is a judgment of probation in Cause No. 17,554-B styled The State of Texas vs. Charles Young. (S.F., T/P, p. 10, l. 13-25, p. 11, l. 1-12). Here again the Defendant urged his objections that the identity of the person in the exhibits had not been established as being the same as the defendant on trial in the present cause, which was overruled and the exhibits were ordered admitted into evidence. (S.F., T/P, p. 11, l. 13-20).

At the conclusion of the testimony of the Witness Schroeder, deputy district clerk, the Assistant District Attorney, Mr. Tompkins, made the following statement: "Your Honor, at this time, since both of these cases were tried and heard before the 78th District Court with your Honor, Judge Stanley C. Kirk, presiding, the State asks that the Court take judicial notice of the identity of this Charles Young as being the same Charles Young in the two cases." The Court answered" "Now, whether I can or not, that's still no evidence for a jury." Mr. Tompkins: "May we approach the bench, sir?" The Court: "Yes, sir."

Thereupon the Court left the bench and took the witness chair and was sworn in by the bailiff, leaving the bench vacant. (S.F., T/P, p. 13, l. 3-15), whereupon the Defendant made the following objection:

"I do have an objection to state. The Defendant, at this time, Charles Young, makes his objection to the presiding judge in this case being called as a witness to testify for the State for a number of reasons. And of course, first and foremost reason being then that the judge then disrobes in terms of judicial impartiality and takes the place of the State's witness. For the additional reason that there is, apparently, the same judge who is prepared to testify here has to rule on this very objection that I am making now and there is no judge present in the courtroom other than the presiding judge who is a witness, to rule on objections at this time."

The Court: "Overruled." (S.F., T/P, p. 13, l. 18-25; p. 14, l. 1-6).

Then, to the amazement of all, the presiding judge, clad in judicial robes, sat in the witness box, and testified to the identity of the defendant on trial as being the same as the defendant mentioned in the exhibits offered by way of the witness Schroeder. (S.F., T/P, p. 16, l. 1-12; p. 15, l. 1-25; p. 14, l. 10-25).

Whereupon the Defendant renewed his objection that had been previously stated regarding the presiding judge testifying in the same cause, leaving the bench vacant. The Court overruled the objection. The Defendant then moved for a mistrial, which was also overruled. Whereupon the judge returned to the bench as judge. (S.F., T/P, p. 16, l. 13-21). The Defendant made the motion that Judge Stanley Kirk disqualify himself from any further participation in the trial and declare a mistrial. The Court overruled this objection. (S.F., T/P, p. 17, l. 12-15).

The question presented therefore is substantial in that can a presiding judge testify against a defendant consistent with the principles of due process of law as guaranteed by the Constitution of the United States of America, Fourteenth Amendment, and rely upon Art. 38.13, Vernon's Texas Annotated Code of Criminal Procedure. The Appellant contends that these two concepts are totally incompatible with due process of law

and the right to trial by jury and apparently the article that condones such conduct should be declared unconstitutional.

It is clear from the outline of testimony presented above that the presiding judge in this cause during the punishment phase of the trial left the bench vacant and positioned himself in the witness chair and proceeded to give testimony adverse to the Defendant. I is also obvious that at the time the trial judge took the stand the State had become impaled upon the horns of a dilemma. The State had already offered evidence from the Witness Schroeder that a Charles Young had been twice before convicted of felonies. It is obvious from a fair reading of the Statement of Facts that the assistant district attorney anticipated that the Court would take judicial notice that the identity of the Defendant is the same as the Charles Young in the instruments already marked as exhibits and admitted into evidence over the objection of the Defendant. However, the Court refused to do this. Then the State sought solice by calling a conference at the bench. During this conference at the bench, the trial judge, Judge Stanley Kirk, rose from the bench, still clad in judicial robe and left the bench and positioned himself in the witness chair. At this point the bench was vacant and the only judge in the courtroom was the judge who was prepared to give testimony against the Defendant from the witness stand. The judge was sworn by his own bailiff and gave testimony against the Defendant, all over the objection of the Defendant.

These events bring into sharp focus the question of the constitutionality of Art. 38.13, Vernon's Texas Annotated Code of Criminal Procedure. It is important to note that this statute is not limited in any way as to the type of testimony the trial judge might give. Further, it is not clear and is

certainly not set out in this statute that during the period of time that the trial judge is testifying from the witness stand that another judge shall be sworn in to rule on objections and the competency of testimony.

It is for these reasons that the Appellant in this case seeks to have Art. 38.13, Vernon's Texas Annotated Code of Criminal Procedure, declared unconstitutional as a direct denial of due process of law as guaranteed by the Constitution of the United States of America, Fourteenth Amendment.

The issue presented by this appeal calls into play certain very basic rights guaranteed to every citizen of the State of Texas and of the United States. Consider also Art. 1.12, Vernon's Texas Annotated Code of Criminal Procedure, which provides, "The right of trial by jury shall remain inviolate."

The Court of Appeals in their opinion in this case affirmed the actions of the trial court and the conviction of the defendant and the punishment meted out with such words as "unfortunate" and "reluctantly." An examination of the Court of Appeals opinion perplexes the Appellant somewhat. The Court of Appeals, even though finding Art. 38.13, Vernon's Texas Annotated Code of Criminal Procedure, constitutional as written, adds, "Texas is one of only a few states which permits the presiding judge to testify as a witness in a case he is trying. In the federal courts the trial judge may not testify as a witness, and no objection need be made in order to preserve the point. Rule 605, Federal Rules of Evidence." (Court of Appeals Opinion, p. 4). As a matter of fact, the Court of Appeals in their opinion points out that the practice of the trial judge serving as a witness in a case he is trying has been roundly condemned. Terrell v. United States, 6 F.(2d)498, Fourth Circuit, Circuit Court of Appeals, 1925.

It is clear to the Appellant that the Court of Appeals also roundly condemns the actions of the trial judge in the case at bar, but nevertheless, finds the actions of the trial judge in this case compatible with the Fourteenth Amendment of the Constitution of the United States of America Due Process Clause.

The only hint as to how these two conflicting concepts can be reconciled is found in the Court of Appeals Opinion wherein the Court of Appeals "amends" Art. 38.13, Vernon's Texas Annotated Code of Criminal Procedure, to bring it within the constitutional provisos of the Fourteenth Amendment, Due Process Clause. The Court of Appeals used this language:

> "Although we are unable to hold Art. 38.13 V.A.C.C.P., unconstitutional, we think it is a rule of procedure which should be used only in extremely rare circumstances and only then in such a manner as to not put the judge in the position of an advocate. In this case, the trial judge testified only to facts within his certain knowledge, since he had tried all three cases involved, the two prior cases as well as the incident one, and he did know for a certainty that the defendant was one and the same in all cases. We would condemn testimony such as offered in Kemp v. State, 382 S.W.2d 933 (Tex.Cr.App.-1964), where the judge volunteered an opinion of the condition of the defendant. We think certainly that the application of this statute should be limited to judicial or clerical fact within the certain knowledge of the trial judge." (Court of Appeals Opinion, p. 4).

An examination of this statement is a limitation by the Court of Appeals upon Art. 38.13, Vernon's Texas Annotated Code of Criminal Procedure, which is not found within that Article at all, and is clearly an attempt by the Court of Appeals to amend Art. 38.13 to attempt to bring it within the constitutional requirements of due process under the Fourteenth Amendment of the Constitution of the United States of America.

The Court of Appeals also extends Art. 38.13, Vernon's Texas Annotated Code of Criminal Procedure, even further with this language:

> "In our opinion it would be appropriate if Art. 38.13, V.A.C.C.P., were amended so as to require any trial judge who feels compelled to assume the role of a witness to request another judge to sit for him to rule on any objections made to his testimony." (Court of Appeals Opinion, p. 4).

In its present state Art. 38.13, Vernon's Texas Annotated Code of Criminal Procedure, does not have any of these safeguards suggested by the Court of Appeals. It has been repeatedly held in this state that the Court cannot supply words, interpolate words, add or eliminate provisions, to enlarge, extend, or restrict the scope of a law. (53 Tex.Jur. 2d Statutes §124, at page 179); Baylor v. State, 208 S.W.2d 558 (Tex.Cr.App.-1948); In Re Levinson, 274 S.W.2d 76 (Tex.Cr.App.-1955); All Texas Racing Association v. State, 82 S.W.2d 151 (Tex.Cr.App.-1935).

Simply stated, a statute stands or falls as written. It is impossible to bring the provisions of Art. 38.13, Vernon's Texas Annotated Code of Criminal Procedure, as written within the provision of the Constitution of the United States of America, Fourteenth Amendment Due Process Clause. Clearly, in the case at bar, the defendant is deprived of a fair and impartial presiding judge. The judge commented directly on the evidence, and as a matter of fact, gave evidence and in so doing, deprived the defendant of the basic requirements guaranteed any defendant as set out above in Art. 1.04, Vernon's Texas Annotated Code of Criminal Procedure.

This being so, the Appellant's conviction should be reversed and the above-described statute held void and unconstitutional and the Appellant be granted a new trial.

CONCLUSION

The questions presented by this appeal are substantial and require plenary consideration by the court for their resolution.

Respectfully submitted.

S. Price Smith, Jr.
State Bar No. 18753500
2504 Ninth Street
Wichita Falls, Texas 76301
(817) 766-1700

Attorney for Appellant

CERTIFICATE OF SERVICE

ON THE 11th day of October, 1983, a true and correct copy of the foregoing document was mailed to Mr. Harold White, District Attorney for Wichita County, Texas, whose address is the Wichita County Courthouse, Seventh and Lamar Street, Wichita Falls, Texas 76301, who is the only opposition party in this Jurisdictional Statement and who represents the State of Texas, by depositing a copy of same in the United States mail, certified, return receipt requested.

S. Price Smith, Jr.
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me on this 11th day of October, 1983.

Notary Public in and for Wichita County, Texas

NO. _____

IN THE SUPREME COURT

THE UNITED STATES

OCTOBER TERM, 1983

CHARLES YOUNG, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

JURISDICTIONAL STATEMENT - STATE CRIMINAL CASE

APPENDIX - GENERAL FORM

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 18753500
2504 Ninth Street
Wichita Falls, Texas 76301
(817) 766-1700

INDEX

Opinion of the Court of Appeals (Appendix A) 12

Order Overruling Petition for Discretionary Review (Appendix B) 20

Appellant's Notice of Appeal (Appendix C) 21

NO. 2-81-065-CR

IN THE COURT OF APPEALS FOR THE

SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

CHARLES YOUNG — APPELLANT

VS.

THE STATE OF TEXAS — STATE

FROM THE DISTRICT COURT OF WICHITA COUNTY

OPINION

Appellant was convicted of the offense of aggravated robbery and assessed 75 years confinement in the Texas Deparment of Corrections by the jury.

His appeal is on five grounds of error.

We affirm.

Johnnie Wheeler, who owned and operated a Phillips '66 service station in Wichita Falls, Texas, on June 9, 1978, was viciously beaten, stabbed in the abdomen and robbed of a large sum of money. Appellant and a male companion were arrested, indicted for and convicted of this robbery by a jury.

After the guilt-innocence phase of the trial, the State, at the punishment phase, introduced two prior felony convictions of appellant, not for enhancement purposes, but simply to persuade the jury to mete out the maximum punishment allowable under the aggravated robbery statute.

Appellant's brief, urging reversal of this case, presents a most unusual and regrettable circumstance. His first three grounds of error, which will be discussed together, concern testimony offered by the trial judge during the punishment phase of this case.

The State, in order to assure a maximum sentence under this conviction, offered, by the testimony of the deputy district clerk of Wichita County, records of the 78th District Court of Wichita

County, of indictments for and conviction of two prior felonies of appellant. The judge who presided over the trial of the case now before us, in the 78th District Court of Wichita County, had also presided over the other trials which resulted in the two prior convictions.

After the records of the prior convictions had been admitted in evidence, the State still had to prove that the Charles Young convicted in the two prior cases was the same Charles Young as the defendant in this case. They did not offer a pen packet, fingerprints of the appellant or anything else to prove the identity of the defendant in the prior cases as well as the instant one. At this point the State called the trial judge to the witness stand to testify to the fact that the defendant in this case was the same person as the defendant in the prior two felony cases which resulted in convictions. The judge took the oath from his bailiff and then testified on the witness stand that the Charles Young who was the defendant in this case was the same person as the defendant Charles Young in the prior two convictions.

This testimony was given by the trial judge over the strenuous objection of appellant. The objection urged to the judges's testimony was basically that it violated the constitutional right of a fair and impartial trial, that at a trial the presiding judge is not a competent witness, and that the duties of a judge and witness are incompatible.

Appellant also vigorously urges this court to declare unconstitutional article 38.13, V.A.C.C.P., which provides:

> "The trial judge is a competent witness for either the State or the accused, and may be sworn by the clerk of his court and examined, but he is not required to testify if he declares that there is no fact within his knowledge important in the case."

The State on the other hand, while agreeing that a judge should only very rarely become a witness in a case tried by him, urges that the procedure is permitted by statute (article 38.13, V.A.C.C.P.) and that the judge in this case did not give an opinion or comment on

the weight of the evidence, but merely testified to facts within his knowledge which were relevant to the punishment phase of this trial. We reluctantly agree with the State's contention.

There are two cases construing the predecessor article to article 38.13, V.A.C.C.P.. That predecessor article is article 717 of the former Code of Criminal Procedure and is in language identical to article 38.13. In the case of O'Neal v. State, 291 S.W. 892 (Tex. Cr. App. - 1927), a burglary case, the defendant was convicted and filed an application for suspended sentence. On the hearing on the application for suspended sentence, the district attorney and the trial judge both testified that appellant's reputation in the county was bad. The appellant in this case had previously testified that his reputation in the county was good. The court in O'Neal said that the defendant's exception to the judge's testifying, raised more a question of the propriety of the judge testifying rather than any legal question, and pointed out that under article 717, Code of Criminal Procedure, 1925, the judge was a competent witness. The court also said that the judge could not very well excuse himself on the ground that he knew no fact bearing upon the case, for, when he was called he testified that he did know that appellant's reputation in the county was bad. "The propriety of the trial judge becoming a witness, must be left largely to his good judgment and discretion in a given case."

The same rule was followed in Kemp v. State, 382 S.W.2d, 933 (Tex. Cr. App. - 1964). This was a driving while intoxicated case where the trial judge, who saw appellant shortly after the incident in question, at the hospital, corroborated the testimony of a highway patrolman to the effect that appellant, in his opinion, was intoxicated. The judge also testified that he felt that in his judicial discretion it was best that he did testify in this case. The Court of Criminal Appeals held that the testimony of the judge was permissible under article 717 of the Code of Criminal Procedure.

Texas is one of only a few states which permits the presiding judge to testify as a witness in a case he is trying. In the federal courts the trial judge may not testify as a witness, and no objection need be made in order to preserve the point. Rule 605, Federal Rules of Evidence.

The practice of the trial judge serving as a witness in a case he is trying has been roundly condemned. See Terrell v. United States, 6 F. (2d) 498, fourth Circuit, Circuit Court of Appeals, 1925, where it was said:

> "Indeed, a judge presiding at a trial is not a competent witness for the duties of a judge and a witness are incompatible. If he testifies he would have to pass upon the competency of his own testimony; and as a witness he might be regarded a partisan, and would be subject to embarrassing conflicts with counsel. The danger to the dignity of the bench, of subjecting its impartiality to doubt and of placing the defendant at an unfair disadvantage by admitting the presiding judge as a witness is very obvious."

See also VI, Wigmore on Evidence, sec. 1909, pgs. 761-769.

Although we are unable to hold article 38.13, V.A.C.C.P., unconstitutional, we think it is a rule of procedure which should be used only in extremely rare circumstances and only then in such a manner as to not put the judge in the position of an advocate. In this case the trial judge testified only to facts within his certain knowledge, since he had tried all three cases involved, the two prior cases as well as the instant one, and he did know for a certainty that the defendant was one and the same in all cases. We would condemn testimony such as was offered in Kemp v. State, supra, where the judge volunteered an opinion of the condition of the defendant. We think certainly that the application of this statute should be limited to judicial or clerical facts within the certain knowledge of the trial judge.

In our opinion it would be appropriate if art. 38.13, V.A.C.C.P., were amended so as to require any trial judge who feels compelled to assume the role of a witness to request another judge to sit for him to rule on any objections made to his testimony.

Appellant complains, in his second ground of error, that the witness oath was administered to the trial judge not by the clerk, as required by article 38.13, V.A.C.C.P., but by the court bailiff. We do not think this point is well taken. The oath should have, as required by the statute, been administered by the clerk of the court. However, we do not think that this variance presents error. The judge did take the required oath and swore to "tell the truth, the whole truth, and nothing but the truth, so help me God." There is no suggestion that the judge was untruthful in his testimony. It is also noted that there was no specific objection to the administering of the oath to the judge by the bailiff. In such a case any error in the administration of the oath was waived. See Spriggs v. State, 289 S.W.2d 272 (Tex. Cr. App. - 1956); Brown v. State, 353 S.W.2d 425 (Tex. Cr. App. -1962). We also suggest that the judge could have taken the oath himself without it being administered to him.

The next ground of error, number three, urged by appellant concerns the refusal of the trial court to grant a requested instruction which would have told the jury not to consider or be influenced by any opinion expressed by the court. Appellant requested such instruction when the punishment charge was submitted to the jury, but in his brief argues that the trial court erred in failing to charge the jury that they are exclusive judges of the facts proven and weight to be given their testimony. The requested charge discussed in the brief differs from that raised during the punishment phase of the trial. It is noted that in the charge of the court at the guilt-innocence phase of the trial, the jury was instructed that they are the exclusive judges of the facts proven, the credibility of the witnesses, and of the weight to be given their testimony. The charge at guilt-innocence phase of the trial also instructed the jury that they should not be influenced in any degree by any opinion that they think the court might have.

The charge given the jury in the punishment phase of the trial instructed them not to arrive at their verdict "by lot, chance or any other method than by full, fair, and free exercise of the opinion of the individual jurors under the evidence submitted before you."

We also note that the trial judge did not express any opinion on the facts at either phase of the trial, and that therefore, the requested instruction was unnecessary. Moreover, if it was proper for the judge to testify, as we have held, the requested instruction would simply have told the jury to ignore his testimony, which instruction would have been improper.

Appellant's first three grounds of error are overruled.

Appellant's fourth ground of error complains of the trial court's admission into evidence, over objection, of a certain set of keys found at the service station, the scene of the robbery, by the police shortly after the occurrence. The appellant objected to the admission of the keys on the grounds of relevancy and that the chain of custody of the keys from the time they were found in the service station until trial had not been established.

The relevancy of the keys found at the service station immediately after the attack on and robbery of Johnnie Wheeler is self-evident. The keys, which the evidence shows did fit the ignition of appellant's car, were found at the scene of the robbery, and obviously linked appellant to that robbery. With respect to the chain of custody of the keys, and the fact that their condition was not altered from the time of their discovery in the service station until time of trial, we think the chain of custody and the constant condition of the keys was well established by the evidence. The testimony, briefly recited, shows that the keys were found on the morning of the robbery by officer Black, who, thinking that the keys belonged to Johnnie Wheeler, the robbery victim, took them out to the service station. Admittedly, the keys stayed there for some period of time, the extent of which is not shown, and were then taken to the hospital and shown to Johnnie Wheeler,

who said the keys were not his. A service station employee also tried the keys in Wheeler's car and none of the keys on the keyring found at the service station, fitted Wheeler's automobile. The keys were eventually taken back to the police station and kept in a property room until time of trial. Four different witnesses testified that the keys admitted in evidence looked exactly like the keys found by Officer Black on the morning of the robbery at the scene. In addition, a locksmith testified that one of the keys on the keyring found at the scene would fit a General Motors product ignition lock manufactured in 1969, 1973 or 1977, and that another key on the ring would fit the trunk lock of a 1969, 1973 or 1977 General Motors product. The locksmith also testified that he tried one of the keys found on the keyring in the ignition of appellant's car and that it fit the ignition and started the motor.

Moreover, a picture of the keyring found on the bloody floor of the service station immediately after the robbery and during the police investigation was introduced in evidence and the jury was able to compare the picture of the keys with the actual keys admitted in evidence. We hold that any objection to the introduction of the keyring because of their condition or chain of custody from beginning to end, went only to the weight of the evidence and not to its admissibility. We think there was ample evidence for the jury to determine that the keys found at the robbery scene did belong to the appellant.

In his fifth and last ground of error, appellant urges error on the part of the trial court in admitting into evidence a photograph of the victim in the hospital which showed the surgical incision and scar as the result of surgery necessitated by the stabbing at the time of the robbery. Objection was made by the appellant on the ground that this exhibit showed a surgical scar as a result of the surgical process which could not have been present on the date of the alleged robbery. This objection is not well taken because while the surgical scar obviously was not

present at the time of the robbery, it occurred shortly thereafter because of surgery necessitated by the stabbing received by the victim, Johnnie Wheeler, during the robbery. The photograph was obviously relevant to show the seriousness of the wound inflicted by appellant upon the victim during the robbery. Limuel v. State, 568 S.W.2d, 309 (Tex. Cr. App - 1978). The indictment charged appellant with "using and exhibiting a deadly wearon to-wit, a knife" while committing aggravated robbery. It was necessary for the State to show that the knife in fact under these circumstances, was a deadly weapon. Williams v. State, 575 S.W.d, 30 (Tex. Cr. App. - 1979).

The physician who operated on Wheeler described the wound, its gravity, and his treatment. A photograph showing the wound and the surgical scar, under these circumstances, is certainly admissible. Smith v. State, 411 S.W.2d 548 (Tex. Cr. App. - 1967).

Appellant's fifth ground of error is overruled.

Judgment is affirmed.

Walter E. Jordan

WALTER E. JORDAN

JUSTICE

PANEL B

HUGHES, BROWN AND JORDAN, JJ.

PUBLISH

FEB 24 1982

CHARLES YOUNG, Appellant

NO. 311-82 vs.

THE STATE OF TEXAS, Appellee

On Appellant's Petition for Discretionary Review from the Court of Appeals for the 2nd Supreme Judicial District, Court of Texas (Wichita County)

O R D E R

It now appearing that the decision to grant discretionary review was improvident, the Appellant's petition for discretionary review is hereby dismissed.

PER CURIAM

Delivered July 20, 1983

En Banc

DO NOT PUBLISH

RECEIVED
COURT OF CRIMINAL APPEALS

SEP -9 1983

Thomas Lowe, Clerk

NO. 2-81-065-CR

IN THE COURT OF APPEALS FOR THE

SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

CHARLES YOUNG	§	APPELLANT
VS.	§	
THE STATE OF TEXAS	§	APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that CHARLES YOUNG, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Texas Court of Criminal Appeals, entered on the 20th day of July, 1983.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

Respectfully submitted,

SMITH, DOUGLASS & COOK
2504 Ninth Street
Wichita Falls, Texas 76301
(817) 766-1700

By: _____
S. Price Smith, Jr.
State Bar No. 18753500

Attorney for Appellant

SEP - 9
Thomas Lowe Clerk
Court of Criminal Appeals of Texas
By Belva Myler
Deputy

CERTIFICATE OF SERVICE

ON THIS 11th day of October, 1983, a true and correct copy of the foregoing document was mailed to Mr. Harold White, District Attorney for Wichita County, Texas, whose address is the Wichita County Courthouse, Seventh and Lamar Street, Wichita Falls, Texas 76301, who is the only opposition party in this Jurisdictional Statement and who represents the State of Texas, by depositing a copy of the above document in the United States mail, certified, return receipt requested.

S. Price Smith, Jr.
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me this 11th day of October, 1983.

Notary Public in and for Wichita County, Texas

NO. _____

IN THE SUPREME COURT

THE UNITED STATES

OCTOBER TERM, 1983

CHARLES YOUNG, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

ON APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS

DESIGNATION BY APPELLANT OF PARTS OF RECORD TO BE INCLUDED IN APPENDIX

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 18753500
2504 Ninth Street
Wichita Falls, Texas 76301
(817) 766-1700

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

CHARLES YOUNG, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

NO. _____

DESIGNATION BY APPELLANT OF PARTS OF RECORD
TO BE INCLUDED IN APPENDIX

TO: Harold White, Counsel for Respondent

Appellant, Charles Young, hereby designates the following portions of the record to be included in the appendix:

1. Indictment in the case styled The State of Texas v. Charles Young, in Cause No. 18,001-B, in the 78th Judicial District Court of Wichita County, Texas.

2. Statement of Facts, Trial on Punishment, in the case styled The State of Texas vs. Charles Young, in Cause No. 18,001-B, in the 78th Judicial District Court of Wichita County, Texas.

3. Opinion of the Court of Appeals, No. 2-81-065-CR, dated February 24, 1982.

4. Order Overruling Appellant's Petition for Discretionary Review dated July 20, 1983.

5. Notice of Appeal to the Supreme Court of the United States filed September 2, 1983.

S. Price Smith, Jr.
State Bar No. 18753500
2504 Ninth Street
Wichita Falls, Texas 76301
(817) 766-1700

Attorney for Appellant

CERTIFICATE OF SERVICE

On the 11th day of October, 1983, a true and correct copy of the foregoing document was mailed to Mr. Harold White, District Attorney for Wichita County, Texas, whose address is the Wichita County Courthouse, Seventh and Lamar Street, Wichita Falls, Texas, 76301, who is the only opposition party in this Jurisdictional Statement and who represents the State of Texas, by depositing a copy of the above document in the United States mail, certified, return receipt requested.

S. Price Smith, Jr.
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me this 11th day of October, 1983.

Notary Public in and for Wichita County, Texas

BRIDGET BARNHILL
Notary Public, State of Texas
Commission Expires Mar. 6, 1985

NO. 83-5573

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1983

RECEIVED
OCT 12 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHARLES YOUNG, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

ON APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 18753500
2504 Ninth Street
Wichita Falls, Texas 76301
(817) 766-1700

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1982

CHARLES YOUNG, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

NO. _____

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Appellant, Charles Young, moves the Court for an order permitting him to proceed in this Court, in forma pauperis, with his appeal from the judgment of the Texas Court of Criminal Appeals entered in this cause on July 20, 1983, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 46 of the Rules of this Court, and in support thereof attaches the affidavit of said appellant.

Appellant's jurisdictional statement is being filed with this motion and appellant's affidavit.

S. Price Smith, Jr.
State Bar No. 18753500
2504 Ninth Street
Wichita Falls, Texas 76301
(817) 766-1700

CERTIFICATE OF SERVICE

On this the 11th day of October, 1983, a true and correct copy of the foregoing document was mailed to Mr. Harold White, District Attorney for Wichita County, Texas, whose address is the Wichita County Courthouse, 7th and Lamar Street, Wichita Falls, Texas 76301, who is the only opposition party in this cause and who represents the State of Texas, by depositing a copy of the above document in the United States mail, certified, return receipt requested, at Wichita Falls, Texas 76301.

S. Price Smith, Jr.
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me this 11th day of October, 1983.

Notary Public in and for Wichita County, Texas

BRIDGET BARNHILL
Notary Public, State of Texas
Commission Expires Dec. 6, 1985

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1982

CHARLES YOUNG, APPELLANT

V.

THE STATE OF TEXAS, RESPONDENT

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS
AND AFFIDAVIT IN SUPPORT THEREOF

I, Charles Young, hereby apply for leave to proceed in the above-entitled action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the Appellant in the above-entitled case and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

(3) The nature of my appeal is briefly stated as follows: constitutionality of Art. 38.13, V.A.C.C.P.

I further declare that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. N/A

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

      June, 1978; $240.00 or less per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. N/A

3. Do you own any cash or checking or savings account? No.

   a. If the answer is yes, state the total value of the items owned. N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

   a. If the answer is yes, describe the property and state its approximate value. N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   None.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Charles Young T.D.C.# 284654

CHARLES YOUNG

SUBSCRIBED AND SWORN TO before me this 31 day of August, 1983.

My commission expires:
06-28-86

Paul A Frawley
Notary Public in and for Anderson County, Texas
PAUL A. FRAWLEY

SM

Supreme Court, U.S.
FILED
FEB 1 1984
ALEXANDER L. STEVAS
CLERK

NO. 83-5573

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

CHARLES YOUNG,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The Texas Court Of Criminal Appeals

APPELLEE'S MOTION TO DISMISS OR AFFIRM

JIM MATTOX
Attorney General of Texas

LESLIE A. BENITEZ*
Assistant Attorney General
Chief, Enforcement Division

DAVID R. RICHARDS
Executive Assistant
Attorney General

JAMES O. KOPP
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas, 78711
(512) 475-3281

---

* Attorney of Record

NO. 83-5573

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

CHARLES YOUNG,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The Texas Court Of Criminal Appeals

PROOF OF SERVICE

I hereby certify that on the 30th day of January, 1983, one copy of the Appellee's Motion to Dismiss or Affirm was mailed, postage prepaid, to Mr. S. Price Smith, Jr., 2504 Ninth Street, Wichita Falls, Texas 76301. All parties required to be served have been served. I am a member of the Bar of this Court.

Leslie A. Benitez

LESLIE A. BENITEZ
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEY FOR APPELLEE

SUBSCRIBED AND SWORN TO BEFORE ME this 30th day of January, 1983.

Cynthia L. Adams

NOTARY PUBLIC in and for
Travis County, T E X A S

NO. 83-5573

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

CHARLES YOUNG,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The Texas Court Of Criminal Appeals

APPEARANCE OF COUNSEL

The Clerk will enter my appearance as counsel for the State of Texas who in this Court is Appellee. I certify that I am a member of the bar of the Supreme Court of the United States.

LESLIE A. BENITEZ
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEY FOR APPELLEE

QUESTION PRESENTED

Whether the Texas Court of Criminal Appeals erred in holding art. 38.13, Tex. Code Crim. Proc. Ann (Vernon), constitutional and not in violation of the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.	i
INDEX OF AUTHORITIES.	iii
OPINION BELOW	1
JURISDICTION.	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATUTORY PROVISION INVOLVED.	2
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition Below	2
B. Statement of Facts.	3
MOTION TO DISMISS	3
MOTION TO AFFIRM.	5
CONCLUSION.	6

INDEX OF AUTHORITIES

Cases	Page
Bowman v. State, 598 S.W.2d 809 (Tenn.App. 1980)	4
Chapman v. California, 386 U.S. 18 (1967)	5
Duncan v. Louisiana, 391 U.S. 145 (1968)	4
Fernandez v. State, 382 S.W.2d 935 (Tex.Crim.App. 1964)	3
Gideon v. Wainwright, 372 U.S. 335 (1963)	4
Leighton v. Henderson, 414 S.W.2d 419 (Tenn. 1967)	4
Malloy v. Hogan, 378 U.S. 5 (1964)	4
O'Neal v. State, 291 S.W.2d 892 (Tex.Crim.App. 1927)	3
State v. Henderson, 423 S.W.2d 439 (Tenn. 1968)	4
Young v. Texas, 629 S.W.2d 247 (Tex.Ct.App. 1982)	1,2
Statutes	
28 U.S.C. §1257(2)	2
Tex. Code Crim. Proc. Ann. art. 38.13 (Vernon)	1,2,3,5
Article 717, Tex. Penal Code (1925)	3
Fed.R.Evid. 605, Notes of Advisory Committee	4
Sup.Ct.R. 16.1(b)	3,5
Other Authorities	
Model Code of Evidnece Rule 302 (1942)	5
Morgan, Basic Problems of State and Federal Evidence 79 (J Weinstein 5th ed 1976)	5
6 Wigmore, Evidence §1909 (J. Chadbourne 1976)	4,5

NO. 83-5573

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

CHARLES YOUNG,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The Texas Court Of Criminal Appeals

APPELLEE'S MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Texas Court of Criminal Appeals.

OPINION BELOW

The opinion of the Texas Court of Appeals for the Second Supreme Judicial District is reported at 629 S.W.2d 247 (Tex.Ct.App. 1982), and is annexed as Appendix A to Appellant's Jurisdictional Statement. The unpublished order by the Texas Court of Criminal Appeals dismissing the Petition for Discretionary Review is annexed as Appendix B to Appellant's Jurisdictional Statement.

STATEMENT OF JURISDICTION

The Texas Court of Appeals sustained the constitutionality of Tex. Code Crim. Proc. Ann. art. 38.13 (Vernon) in affirming

Young's conviction on February 24, 1982. The Texas Court of Appeals subsequently overruled Young's timely filed motion for rehearing on March 24, 1982. Young timely filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals, which was dismissed on July 20, 1983. Young filed his notice of appeal to the United States Supreme Court on September 2, 1983. The jurisdiction of this Court is pursuant to 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISION INVOLVED

The due process clause of the Fourteenth Amendment to the United States Constitution.

STATUTORY PROVISION INVOLVED

Art. 38.13, Tex. Code Crim. Proc. Ann. (Vernon), which provides as follows:

> The trial judge is a competent witness for either the State or the accused, and may be sworn by the clerk of his court and examined, but he is not required to testify if he declares that there is no fact within his knowledge important in the case.

STATEMENT OF THE CASE

A. Course of proceedings and disposition in court below

Respondent has custody of Young pursuant to a judgment and sentence of the 78th District Court of Wichita County, Texas, in Cause No. 18,001-A, styled The State of Texas v. Charles Young. Young was charged with the first degree felony offense of aggravated robbery, to which he entered a plea of not guilty. Young was tried by a jury, which on September 20, 1978 found him guilty of the offense charged in the indictment and assessed punishment at confinement in the Texas Department of Corrections for seventy-five years. An appeal was perfected to the Texas Court of Criminal Appeals. The case was subsequently transferred to the Court of Appeals for the Second Supreme Judicial District, which rendered a decision on February 24, 1982, affirming the conviction. Young v. State, 629 S.W.2d at 247. Following the denial of a Motion for Rehearing, Young filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals, which was overruled on July 20, 1983 (No. 311-82).

B. Statement of Facts

At the sentencing stage of the trial, the State offered evidence that Young had been convicted on two prior occasions and had received a probated sentence on each. First, the State offered into evidence the indictment, judgment and judgment of probation from Young's two prior convictions, both in the 78th District Court of Wichita County, Texas (State's Exhibits 29, 29A, 29B, 30, 30A, 30B). Shirley Schroeder, a deputy in the District Clerk's office of Wichita County, testified that the court documents were business records, and that the person convicted of both prior offenses was Charles Young (SOF Vol. V at 5-12). The instant case was decided in the 78th District Court of Wichita County, Texas, and the presiding Judge was the Honorable Stanley C. Kirk, the same judge who had presided over both of Young's prior convictions. To prove that the Charles Young who was convicted in the prior offense was the same person who was then on trial, the State offered the testimony of Judge Kirk, the presiding judge. Judge Kirk took the witness stand, was sworn, and testified solely to the fact that the Charles Young who was presently on trial was the same person who had been convicted for the prior offense (SOF Vol. V at 13-16).

MOTION TO DISMISS

Pursuant to Sup.Ct.R. 16.1(b), the appeal should be dismissed because it fails to present a substantial federal question. Although the provision contained in art. 38.13, Tex. Code Crim. Proc. Ann. (Vernon) has been the law in Texas for nearly sixty years, see art. 717, former Tex. Penal Code (1925), the claim Young presently raises has been presented to the Texas courts on appeal on only two prior occasions, the most recent in 1964. Fernandez v. State, 382 S.W.2d 935 (Tex.Crim.App. 1964); O'Neal v. State, 291 S.W.2d 892 (Tex.Crim.App. 1927). In addition, in the two other states which presently have similar

provisions, Idaho and Tennessee, [1] the statute has been considered on appeal a total of three times in Tennessee, [2] and never in Idaho. Because of the infrequency in which statutes such as this are applied, this issue is not so substantial as to warrant further consideration from this Court.

That this appeal should be dismissed is further shown by a review of the merits of Young's claim. The principles for reviewing alleged violations of due process under the Fourteenth Amendment are well settled. Although the standard of review has been stated in various ways, see, e.g., Duncan v. Louisiana, 391 U.S. 145, 149 (1968), the test which is most appropriate in the context of the present claim is whether the Texas statute violates a fundamental right which is essential to a fair trial. Id.; Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963); Malloy v. Hogan, 378 U.S. 5, 6 (1964). A number of reasons are given for precluding a judge from testifying at a trial over which he is presiding, including the problem of who rules on objections or compels the judge to testify, the problem of impeaching or cross-examining the judge effectively, and, in a jury trial, the problem that the jury might believe the judge favors one side. See Fed.R.Evid. 605, Notes of Advisory Committee; 6 Wigmore, Evidence §1909 (J. Chadbourne 1976). The drafters of the federal rules resolved these problems by providing that "[t]he judge presiding at the trial may not testify in that trial as a witness." Fed.R.Evid. 605. The fact that the drafters of the federal rules chose to exclude the presiding judge's testimony does not compel the conclusion that testimony by the judge automatically renders a trial fundamentally unfair. As noted by Wigmore:

1/ See Idaho Code §9-204 (1979) anf former Idaho Code §9-204 (1948); Tenn. Code Ann. §24-1-205 (1980) and former Tenn. Code §24-107 (1955).

2/ Bowman v. State, 598 S.W.2d 809 (Tenn.App. 1980); State v. Henderson, 423 S.W.2d 489 (Tenn. 1968); Leighton v. Henderson, 414 S.W.2d 419 (Tenn. 1967).

> There is a modicum of truth in all these objections. Yet is it necessary on that account to lay down a universal prohibition? The force of the objections would rise to an appreciable degree only when the judge became a principal witness -- as in the case put by King Henry IV, where the judge had been an eyewitness of a murder. In all such instances (which are rare enough), the usefulness of his testimony would be known beforehand, and his own discretion and the parties' could be trusted to send the cause before another judge for trial. But in the ordinary instance the judge's testimony is desired for merely formal or undisputed matters, such as the proof of execution of a certificate or of the administration of an oath or of a deceased witness' former testimony. To suppose here a danger that the inconveniences above noted would occur in any appreciable degree is to be unduly apprehensive. Military commanders do not train cannon on a garden gate; and the law of evidence need not employ the cumbrous weapon of an invariable rule of exclusion to destroy an entire class of useful and unobjectionable evidence in order to avoid embarrassments which can easily be dealt with when they arise.

6 Wigmore, Evidence §1909 (J. Chadbourne 1976). See also, Morgan, Basic Problems of State and Federal Evidence 79 (J. Weinstein 5th ed 1976); Model Code of Evidence Rule 302 (1942). In fact, the Texas Court of Appeals construed the statute strictly, making the problems which Young complains of virtually nonexistent. The Court wrote that art. 38.13, Tex. Code Crim. Proc. Ann. (Vernon) "is a rule of procedure which should be used only in extremely rare circumstances and only then in such a manner as to not put the judge in the position of an advocate . . ." and that "the application of this statute should be limited to judicial or clerical facts within the certain knowledge of the trial judge." Young v. State, 629 S.W.2d at 250. Therefore, as construed by the Texas Court of Criminal Appeals, art. 38.13 does not render a trial fundamentally unfair.

MOTION TO AFFIRM

Pursuant to Sup.Ct.R. 16.1(d), the judgment should be affirmed because the error, if any, is harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967). Young first argues that it was unfair for the presiding

judge to vacate the bench and testify from the witness chair, because there was nobody present to rule on objections. The record discloses, however, that no objections were made to the judge's testimony, other than to the fact that the judge was giving testimony. Because the testimony which the judge gave was unobjectionable and no objection was made, Petitioner has not been harmed by this alleged error. Young also argues that by testifying, the judge gave the impression to the jury that he was partial to the state. In the instant case, however, the judge merely testified to the uncontested fact that Young had twice previously been convicted of other offenses (SOF Vol. V at 13-16). This testimony, which was presented at the sentencing stage of the trial, was not of such a nature as to indicate to the jury that the judge favored either side. In addition, although the jury was not required to believe the testimony of any witness, it is extremely unlikely that the jury would disbelieve the uncontradicted testimony by a judge, whether he was the presiding judge or not. The fact that the witness to Young's prior convictions was also the presiding judge is therefore not a factor in the jury's decision. The testimony by the judge was thus harmless beyond a reasonable doubt.

CONCLUSION

For these reasons, Respondent respectfully prays that the cause of action herein be dismissed, or in the alternative, that the decision of the court below be affirmed.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

LESLIE A. BENITEZ
Assistant Attorney General
Chief, Enforcement Division

JAMES O. KOPP
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT